

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NELSON OLWALDO MENDOZA,

Defendant-Appellant.

UNPUBLISHED
February 11, 2010

No. 288509
Oakland Circuit Court
LC No. 2008-220070-FC

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree premeditated murder, MCL 750.316(1)(a), and one count of conspiracy to commit murder, MCL 750.157a. The trial court sentenced him to three concurrent terms of life imprisonment. We affirm his convictions.

I. Underlying Facts

Defendant's convictions arise from the murder-for-hire killings of a married couple, Aasha and Brij Chhabra, at their home in Troy, Michigan, on March 11, 2008. The testimony at trial established that Miguel Servando traveled from Texas to Michigan to commit the murders in exchange for \$30,000 from Narayan Thadani, who had allegedly embezzled Aasha Chhabra's money, and that Servando alone entered the Chhabras' house and shot both victims in the head. Servando pleaded guilty to two counts of first-degree murder, conspiracy to commit murder, and two counts of possession of a firearm during the commission of a felony. He tendered his pleas pursuant to a plea agreement whereby he was allowed to serve his life sentences in a federal prison and federal authorities agreed not to seek the death penalty against him if he was prosecuted for any federal offenses arising from the Chhabras' homicides. Servando also agreed to testify against defendant.

At trial, Servando testified that defendant was aware of the murder-for-hire plan, agreed to participate, and accompanied Servando from Texas to Michigan to carry out the plan. Servando testified that defendant drove him to the Chhabras' house, and then waited at a nearby gas station while Servando shot the victims inside their home. After committing the offense, Servando and defendant began to drive back to Texas, but were detained in a traffic stop in Taylor, Michigan. Police officers discovered Servando's gun in the car, and then later discovered a blood-stained envelope, a blood-stained latex glove, a photocopy of Aasha

Chhabra's passport, a diagram of the Chhabras' house, and documents listing the Chhabras' names and directions to their house.

II. Sufficiency of the Evidence

Defendant argues, unpersuasively, that the evidence was insufficient to support his convictions.

A criminal defendant's challenge to the sufficiency of the evidence requires this Court to consider whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *Nowack*, 462 Mich at 400. Conflicting evidence should be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004). Thus, a reviewing court must defer to the jury's credibility choices and its reasonable inferences drawn from the evidence. *Nowack*, 462 Mich at 400.

A conviction of first-degree premeditated murder requires evidence that "the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation requires "sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). A person who conspires together with another person to commit an offense prohibited by law is guilty of the crime of conspiracy. MCL 750.157a. The gist of the offense lies in the unlawful agreement between two or more persons. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective. *Id.*

Although defendant argues that he could not be convicted of murder because there was no evidence that he shot the Chhabras, the prosecutor's theory of the case was that defendant was guilty as an aider and abettor. A person who aids or abets the commission of a crime may be convicted as if he directly committed the crime. *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *Id.* Aiding and abetting describes all forms of assistance rendered to the perpetrator, including any words or deeds that may support, encourage, or incite the commission of a crime. *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988).

Here, the testimony at trial indicated that defendant assisted Servando in committing the offenses by driving Servando to the Chhabras' house and then waiting nearby while Servando went inside and shot both victims. Moreover, the evidence showed that defendant was aware of Servando's intent to murder both victims when he drove Servando to their house. Servando testified that he first learned of Thadani's plan to kill the Chhabras when defendant informed him that Douglas Tobar, an associate of Thadani, was looking for someone to kill two persons in

Michigan. Although defendant was not involved in the meetings in which Servando, Tobar, and Thadani planned the killings, Servando testified that defendant persuaded him to allow defendant to accompany Servando to Michigan, knowing that Servando was going there to kill two people. Servando testified that he and defendant discussed the murder-for-hire plan during their drive to Michigan, and that defendant was present when Servando openly discussed this plan with a Michigan acquaintance, Eduardo Hernandez. Hernandez corroborated Servando's testimony that defendant was present when Servando admitted his true purpose in coming to Michigan. Hernandez also testified that he tried to dissuade defendant from following through with the plan, and that defendant made comments such as, "I've got [Servando's] back" and "I'm not gonna let this guy down."

The evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant conspired with Servando to kill the Chhabras, and that defendant participated in the crime knowing that Servando possessed the specific intent to murder them. Although defendant argues that there are alternative ways of viewing the evidence consistent with his innocence, we are required to view the evidence in a light most favorable to the prosecution and to resolve all conflicts in the evidence in favor of the prosecution. *Fletcher*, 260 Mich App at 561-562. Similarly, the credibility of the witnesses was for the jury to resolve and this Court must defer to the jury's credibility determinations. *Nowack*, 462 Mich at 400. Viewed in this manner, the evidence was sufficient to support defendant's convictions.

III. Great Weight of the Evidence

Defendant alternatively argues that even if the evidence is legally sufficient to support his convictions, he is entitled to a new trial because the jury's verdict is against the great weight of the evidence. Because defendant did not raise this issue in a posttrial motion for a new trial, it is not preserved. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Consequently, review is limited to plain error affecting defendant's substantial rights. *Id.*

The appropriate test for determining whether a verdict is against the great weight of the evidence "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Here, defendant relies on ambiguities in some of the testimony to support his argument, but the alleged ambiguities do not detract from the testimony of two witnesses which, if believed, clearly established that defendant had full knowledge of Servando's specific intent to murder the two victims when he acted as Servando's getaway driver. When evaluating a great-weight-of-the-evidence claim, a reviewing court may not act as a "thirteenth juror" or attempt to resolve credibility questions anew. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Rather, a new trial may be granted on the basis of questions of witness credibility only in narrow circumstances, such as when the testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable juror could not believe it. *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998). The testimony in this case falls far short of meeting these standards. Defendant has failed to demonstrate a plain error affecting his substantial rights.

IV. Effective Assistance of Counsel

Defendant also argues that a new trial is required because defense counsel was ineffective at trial. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*¹ hearing in the trial court, our review is limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish ineffective assistance of counsel, defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that but for counsel's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002).

Defendant says that trial counsel was ineffective for failing to object to the prosecution's use of leading questions during his examination of Servando. Generally, leading questions should not be used on the direct examination of a witness except as necessary to develop the witness's testimony. MRE 611(c)(1). However, the improper use of leading questions does not warrant reversal unless prejudice or a pattern of eliciting inadmissible testimony can be shown. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Here, defendant does not claim that the prosecutor's leading questions resulted in inadmissible testimony being elicited. Further, the record does not support defendant's claim that he was prejudiced by the questions, and the prosecutor's questions were not leading. The questions that could be considered leading were not overly suggestive, and were mostly directed at either background information or Servando's personal involvement in the offense. Although the prosecutor asked Servando whether certain events took place, those questions did not anticipate Servando's answers. Further, defendant has not overcome the presumption that defense counsel declined to object to the questions as a matter of trial strategy, either because the questions were not directed at defendant's personal involvement in the matter, or because counsel wanted to avoid having Servando provide a more elaborative answer to the question. For these reasons, defendant has not established that counsel's failure to object was objectively unreasonable or likely had an effect on the outcome of the trial.

Defendant also contends that defense counsel was ineffective for disregarding information that defendant provided, and for not presenting a defense. A defense attorney's failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). But counsel's failure to investigate must result in prejudice to the defendant. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Otherwise, decisions regarding what evidence to present and whether to call or question witnesses are matters of trial strategy, which this Court will not second-guess. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a witness does not constitute ineffective assistance of counsel unless the defendant is deprived of a substantial defense, i.e., a defense that might have altered the outcome of the trial. *Id.*; *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Here, defendant failed to provide factual support for his various claims that defense counsel ignored evidence or failed to present a substantial defense. He asserts that defense counsel was aware of several possible leads that might have established a defense or attacked the prosecution's evidence, but he does not identify any such evidence with specificity. Further, none of defendant's claims are based on any record evidence, nor has defendant presented any affidavits or other evidentiary support for his claims. Accordingly, he has failed to show that defense counsel was ineffective.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ David H. Shapiro